

FILED

MAR 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290352

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STEVEN F. SCHROEDER,
a married man dealing with his sole and separate property,
Plaintiff/Petitioner,

v.

PHILLIP J. HABERTHUR, as Trustee; EXCELSIOR MANAGEMENT
GROUP, LLC; EXCELSIOR MORTGAGE EQUITY FUND, II, LLC;
JAMES HANEY; AND CLS MORTGAGE, INC.,
Defendants/Respondents.

RESPONDENTS PHILLIP J. HABERTHUR, EXCELSIOR
MANAGEMENT GROUP, LLC, AND EXCELSIOR MORTGAGE
EQUITY FUND, II, LLC'S BRIEF

Bradley W. Andersen, WSBA # 20640
Phillip J. Haberthur, WSBA #38038
Attorneys for Respondents,
Phillip J. Haberthur,
Excelsior Management Group, LLC; and
Excelsior Mortgage Equity Fund, II, LLC

FILED

MAR 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290352

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STEVEN F. SCHROEDER,
a married man dealing with his sole and separate property,
Plaintiff/Petitioner,

v.

PHILLIP J. HABERTHUR, as Trustee; EXCELSIOR MANAGEMENT
GROUP, LLC; EXCELSIOR MORTGAGE EQUITY FUND, II, LLC;
JAMES HANEY; AND CLS MORTGAGE, INC.,
Defendants/Respondents.

RESPONDENTS PHILLIP J. HABERTHUR, EXCELSIOR
MANAGEMENT GROUP, LLC, AND EXCELSIOR MORTGAGE
EQUITY FUND, II, LLC'S BRIEF

Bradley W. Andersen, WSBA # 20640
Phillip J. Haberthur, WSBA #38038
Attorneys for Respondents,
Phillip J. Haberthur,
Excelsior Management Group, LLC; and
Excelsior Mortgage Equity Fund, II, LLC

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION.....	1
II. STATEMENT OF ISSUES	3
III. COUNTERSTATEMENT OF THE CASE.....	5
A. Schroeder’s First Default.	5
B. Schroeder’s Second Default.	7
C. Schroeder Obtains TRO Without Providing Sufficient Notice To The Trustee.	8
D. The Court Grants Excelsior’s Motion for Summary Judgment.	10
IV. ARGUMENTS.....	11
A. Judge Nielson Did Not Abuse His Discretion When He Dissolved The Wrongfully Issued TRO.	12
1. Standard of Review is Abuse of Discretion.	12
2. Washington’s Deeds of Trust Act.	12
3. The Deeds of Trust Act provides the exclusive means for conducting a non-judicial foreclosure...	13
4. RCW 61.24.130 provides the only means to challenge a non-judicial foreclosure.	13
5. Schroeder failed to comply with the Act’s notice or bonding requirements.....	14
6. CR 65 (c) is a procedural rule and does not provide	

a substantive basis for the court to enjoin a sale. ...15

B.	Schroeder’s Failure To Restrain The Trustee’s Sale Means He Is Legally Barred From Challenging The Foreclosure.	17
1.	Standard of Review is De Novo.....	17
2.	Washington’s Waiver Rule.	17
C.	Schroeder Received the Proper Notices Under RCW 61.24.040 and was at Least Constructively Aware Of What He Needed To Do To Restrain The Sale, And The Consequences If He Failed To Exercise Those Rights.	19
D.	Schroeder Was Aware Of Those Facts To Support his Claim Long before February 15, 2010.	20
E.	Schroeder Failed To Timely Obtain A Court Order To Prevent The Trustee’s Sale.	23
1.	Bowcutt Does Not Apply.....	25
F.	Judge Nielson did not abuse his discretion when he denied Plaintiff’s Motion to Continue the Summary Judgment Hearing.	30
G.	Because It Was Required To Defend Its Rights Under The Deed Of Trust, Excelsior Is Entitled To Its Fees And Costs.....	31
H.	Since Schroeder Did Not Prevail On His CPA Claims, He Is Not Entitled To His Fees.....	34
I.	Excelsior Is Entitled To Its Attorney Fees And Costs On Appeal.	34
V.	CONCLUSION	35

TABLE OF AUTHORITIES

Page

CASES

<i>Alderwood Assocs. v. Washington Envtl. Coun.</i> , 96 Wn.2d 230, 233, 635 P.2d 108 (1981).....	12
<i>Amresco Independence Funding, Inc. v. SPS Props., LLC</i> , 129 Wn. App. 532, 537, 119 P.3d 884 (2005).....	13
<i>Blanchard v. Golden Age Brewing Co.</i> , 188 Wn. 396, 415-16, 63 P.2d 397 (1936).....	12
<i>Bowcutt v. Delta North Star Corporation</i>	25, 28, 29, 30
<i>Brown v. Household Realty Corp.</i> , 146 Wn. App. 157, 189 P.3d 233 (2008).....	18, 19, 21, 22
<i>CHD, Inc. v. Boyles</i> , 138 Wn. App. 131, 137, 157 P.3d 415 (2007).....	17, 18, 32
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 387, 693 P.2d 683 (1985) .	12, 13, 23, 29
<i>Durrand v. HIMC Corp.</i> , 151 Wn. App. 818, 214 P.3d 189, 195 (2009).....	30
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 563 P.2d 203 (1977).....	12
<i>Hiatt v. Walker Chevrolet Co.</i> , 120 Wn.2d 57, 65, 837 P.2d 618 (1992).....	17
<i>Lenhoff v. Birch Bay Real Estate, Inc.</i> , 22 Wn. App. 70, 74-75, 587 P.2d 1087 (1978).....	12
<i>Marriage of Kaseburg</i> , 126 Wn. App. 546, 558, 108 P.3d 1278 (2005).....	13
<i>Mossman v. Rowley</i> , 154 Wn. App. 735, 229 P.3d 812 (2009).....	30
<i>Orwick v. Seattle</i> , 103 Wn.2d 249, 252, 692 P.2d 793 (1984).....	16
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 225-226, 67 P.3d 1061 (2003).....	<i>passim</i>
<i>Sheldon v. Sheldon</i> , 47 Wn.2d 699, 289 P.2d 335 (1955)	12
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d	

TABLE OF AUTHORITIES

	<u>Page</u>
775 (1971).....	12
<i>Svendsen v. Stock</i> , 143 Wn.2d 546, 555, 23 P.3d 455 (2001).....	24
<i>Universal Life Church v. GMAC Mortgage Corporation</i>	22
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....	17

STATUTES

RCW 61.24	<i>passim</i>
RCW 61.24.130	1, 2, 3
RCW 61.24.130(2).....	3
RCW 61.24.135 (SB 6191 1998).....	25, 26, 27

OTHER AUTHORITIES

15 U.S.C. §§ 1601-1667f.....	22
95 Wn. App. 311, 976 P.2d 643 (1999).....	11, 25
103 Wn.2d 383, 387, 693 P.2d 683 (1985).....	12, 24
CR 65(c).....	2

I. INTRODUCTION

Respondents Phillip J. Haberthur, Excelsior Management Group, LLC, and Excelsior Mortgage Equity Fund, II respectfully submits this brief in response to Appellant Steven Schroeder's appeal.

The Deeds of Trust Act, RCW 61.24 *et seq.*, provides the “only means by which a grantor may preclude a sale once foreclosure has begun.”¹ And under the waiver rule, a party cannot contest the foreclosure or the underlying obligations of a commercial deed of trust when that party fails to successfully stop a non-judicial foreclosure sale under RCW 61.24.130.² This statute requires a person seeking to restrain a foreclosure sale to personally “serve” the trustee with at least five (5) days notice of the “time when, place where, and the judge before whom the application for the restraining order or injunction is to be made.”³ The statute further requires the person to post the amount that is in default as a bond in order for the stay of foreclosure to be effective.

In this case, Plaintiff Steven Schroeder (“Schroeder”) was provided proper notice in November 2009 that the Trustee's Sale was set for February 19, 2010, and of his rights to stop the sale, including a

¹ *Plein v. Lackey*, 149 Wn.2d 214, 225-226, 67 P.3d 1061 (2003); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007).

² *Id.*

³ RCW 61.24.130(2) (“No court may grant a restraining order or injunction to restrain a Trustee's Sale” unless these requirements are met).

description of the procedures. But Schroeder, without excuse, waited until late in the evening of February 15, 2010, more than 100 days after receiving the Notice of Trustee's Sale, to notify the Trustee that he was planning to apply the following day for an ex-parte Temporary Restraining Order ("TRO"). Because neither the Trustee nor defendants Excelsior Management Group, LLC or Excelsior Mortgage Equity Fund, II, LLC (collectively, "Excelsior") were present to explain the law, Judge Allen Nielson granted the TRO on February 16, 2010. But instead of posting the sums required by RCW 61.24.130, Schroeder duped the court into allowing him to set a bond at a much lesser amount. Despite this lesser amount, Schroeder never did post a bond.

On the morning of February 19, prior to the time set for the Trustee's Sale, Judge Nielson dissolved the TRO and ordered the Trustee to proceed with the foreclosure sale as originally scheduled because Schroeder had completely failed to comply with the statutory requirements for contesting a sale. Judge Nielson later applied the waiver rule after the sale occurred and dismissed Schroeder's lawsuit with prejudice.

Though our Supreme Court in *Plein v. Lackey* squarely held that RCW 61.24.130 provides the "only means by which a grantor may preclude a sale once foreclosure has begun," a rule of law that the legislature has endorsed as recently as 2009, Schroeder asks this Court to

ignore precedent and hold that CR 65(c) provides an alternative means for a party to stop a non-judicial foreclosure sale. And while he admits that failure to successfully stop a Trustee's Sale means a party waives the right to challenge the foreclosure, Schroeder wants this court to create a "we tried, but failed" exception to the waiver rule. Such an exception has no basis or foundation in the law.

Because both the case law and the legislative intent is clear, and because the statute provides a fair and efficient process for those who wish to challenge non-judicial foreclosures, the Court should decline this invitation and uphold the waiver rule.

II. STATEMENT OF ISSUES

Excelsior does not assign any errors, but restates the issues on appeal as follows:

1. The Deeds of Trust Act permits a borrower to stop a Trustee's Sale when they "serve" the Trustee with at least five (5) days notice of the "time when, place where, and the judge before whom" the request for the restraining order will be heard.⁴ Schroeder e-mailed the Trustee with less than one (1) day's notice of his intent to acquire an Ex-Parte Temporary Restraining Order.⁵ Did Schroeder provide sufficient

⁴ RCW 61.24.130

⁵ In fact, the Trustee was given less than a day's notice as the e-mail was not sent until after 10:00 p.m. the night before the hearing.

Notice under the Act to stop the sale?

2. Under RCW 61.24.130(2), no court may restrain a Trustee's Sale unless the trustee is served with at least five (5) days notice of the hearing at which the restraining order is sought. Though Judge Nielson initially granted a TRO, he later dissolved the TRO after realizing that sufficient notice had not been provided the Trustee. Did Judge Nielson abuse his discretion when he dissolved the TRO?

3. Under the waiver rule, RCW 61.24.130 provides the "only means" for a grantor to "contest and enjoin" a Trustee's Sale. Because Schroeder failed to comply with the statute, Judge Nielson ordered the Trustee's Sale to proceed as scheduled on February 19, 2010. Did Schroeder waive his right to contest the foreclosure and challenge the Deed of Trust when he failed to properly use the statute's pre-sale remedies to stop the sale and the Trustee's Sale became final?

4. Under CR 56(f), a judge may continue a summary judgment hearing if the non-moving party shows, "by affidavit," that additional facts may be available through discovery to avoid summary judgment.⁶ Schroeder failed to stop the Trustee's Sale and therefore waived his right to challenge the Deed of Trust – no additional evidence would have altered these undisputed facts. Did Judge Nielson abuse his

discretion when he denied Schroeder's Motion to continue the summary judgment hearing?

5. A party that successfully defends its rights under a Deed of Trust containing an attorneys' fee provision is entitled to recover their fees and costs. Schroeder unsuccessfully sued Excelsior to challenge the Deed of Trust. Is Excelsior entitled to its fees on costs before the trial court and on appeal?

III. COUNTERSTATEMENT OF THE CASE

Excelsior offers the following counterstatement of the case.

A. Schroeder's First Default.

In June 2007, Appellant Steven F. Schroeder borrowed money from Respondent Excelsior Management Group, LLC.⁷ To secure the loan, Schroeder conveyed a Deed of Trust on his property.⁸ This was a commercial loan and did not involve owner-occupied residential property.

When Schroeder defaulted on this loan, Excelsior initiated a non-judicial foreclosure of the property. But just before the foreclosure sale, Schroeder filed a lawsuit to try and stop the Trustee's Sale.⁹ In this lawsuit, Schroeder alleged that, despite his warranty in the Deed of Trust

⁶ Schroeder failed to submit an affidavit to support his motion for a continuance.

⁷ CP 8.

⁸ CP 9.

⁹ CP 168-69.

to the contrary, the property was being used for agricultural property.¹⁰

Although Excelsior disputed Schroeder's claim, it voluntarily stopped its non-judicial foreclosure and initiated a judicial foreclosure to avoid any unnecessary delay.¹¹ Shortly afterwards, Schroeder wanted to stop the foreclosures and settle with Excelsior. He therefore offered to sign a new loan and deed of trust to make clear that the property was not used principally for agricultural purposes.¹² In return, Excelsior agreed to stop the foreclosure and give Schroeder a second chance by providing him with a new loan and an extension of the term for repayment.¹³ However, Excelsior insisted that Schroeder stipulate in court that the property was not agricultural property so that Excelsior could conduct a non-judicial foreclosure if Schroeder defaulted again.¹⁴ Schroeder agreed and dismissed his lawsuit with prejudice and expressly waived any right to declare that the property was used principally for agricultural purposes.¹⁵

Schroeder signed a new Promissory Note on March 31, 2009, promising to repay Excelsior \$425,700, and a new Deed of Trust where he warranted that the property was not being used for agricultural purposes,

¹⁰ RCW 61.24.030 prohibits non-judicial foreclosure of agricultural properties.

¹¹ CP 346-48. *Excelsior Mortgage Equity Fund II, LLC v. Steven Schroeder*, Stevens County Superior Court Case No. 2009-2-00048-2.

¹² CP 305.

¹³ CP 346-48.

¹⁴ *Id.*

and promised that it would not be used for such purposes in the future.¹⁶

In addition, the parties executed a Stipulated Motion and Order of Dismissal with Prejudice on April 7, 2009 (“Stipulated Order of Dismissal”).¹⁷

In the Stipulated Order of Dismissal, Schroeder agreed, consistent with the new loan documents, that the property was not being used for agricultural purposes.¹⁸ Schroeder also agreed in the Stipulated Order of Dismissal that he would not claim that the property was being used for agricultural purposes.¹⁹

B. Schroeder’s Second Default.

Schroeder once again defaulted on the new loan documents, forcing Excelsior to proceed with a non-judicial foreclosure.²⁰ On November 6, 2009, Excelsior served Schroeder with a Notice of

¹⁵ *Id.*

¹⁶ CP 304-05; CP 183-205.

¹⁷ CP 346-48.

¹⁸ CP 346-48. The Stipulated Order of Dismissal was presented to and signed by Judge Allen Nielson on April 7, 2010. The Stipulated Order of Dismissal contains eight simple paragraphs and provided that Schroeder:

- 1) Has knowingly waived any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes;
- 2) Shall not be allowed to again allege that the subject property is used for agricultural purposes;
- 3) Any future deed of trust executed by Schroeder to [Excelsior], an associated company or assigns, need not be judicially foreclosed but may be foreclosed non-judicially in accordance with RCW 61.24; and,
- 4) The matter was dismissed with prejudice.

¹⁹ *Id.*

Foreclosure and Notice of Trustee's Sale.²¹ The Notices set the Trustee's Sale for February 19, 2010, which gave Schroeder more than 100 days notice.²² And pursuant to RCW 61.24.040, Excelsior provided Schroeder with the statutory notices alerting him of the right, and need, to initiate a court action if he contested the sale.²³ This notice included the following from RCW 61.24.040: "If you do not reinstate the secured obligation and your Commercial Deed of Trust...in the manner set forth above, or **if you do not succeed in restraining** the sale by Court Action, your property will be sold to satisfy the obligations secured by your Commercial Deed of Trust...."²⁴

In addition, the Notice of Trustee's Sale provided the following warning, in accordance with RCW 61.24.040:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale.²⁵

C. Schroeder Obtains TRO Without Providing Sufficient Notice To The Trustee.

²⁰ CP 305.

²¹ CP 207-220.

²² *Id.*

²³ *Id.*

²⁴ CP 211; 219.

²⁵ CP 219.

Instead of curing the default, or taking earlier legal action under RCW 61.24.130 to stop the sale, Schroeder waited until February 8, 2010 to file the current lawsuit.²⁶ And despite his warranties and Stipulation to the contrary, Schroeder again claimed that Excelsior had to conduct a judicial foreclosure because the property was being used for agricultural purposes.²⁷ Schroeder simultaneously filed a Motion to Restrain the Trustee's Sale, which he noted for February 15, 2010.²⁸

When the Trustee received the Complaint and the Motion to Restrain the Sale, he contacted Schroeder's attorney to advise him that Schroeder had already tried this maneuver.²⁹ The Trustee further pointed out to Schroeder's attorney the previous Stipulated Order of Dismissal and where, in the new loan documents, Schroeder had expressly warranted that the property was not agricultural.³⁰ The Trustee therefore indicated that he was going to contest Schroeder's Motion and proceed with the Trustee's Sale on February 19, 2010.³¹

Schroeder's attorney therefore struck the hearing and indicated that

²⁶ CP 1-7. *Steven Schroeder v. Phillip Habberthur*, Stevens County Superior Court Case No. 2010-2-00054-1.

²⁷ *Id.*

²⁸ CP 175-76.

²⁹ CP 89.

³⁰ *Id.*

³¹ *Id.*

he was going to withdraw his motion.³² But then, on February 15, 2010, Schroeder amended his Complaint to claim that the loan was made in violation of the Consumer Protection Act.³³ Schroeder also filed a new Motion for a Preliminary Injunction, which he e-mailed to the Trustee at 10:18 p.m. on February 16, 2010.³⁴ Schroeder then went before the trial judge, ex-parte, on February 16, 2010 and obtained a TRO at 2:00 p.m.³⁵ The TRO also required a \$5,000 bond, which was never posted.³⁶

Upon learning of its issuance, the Trustee immediately filed a Motion to Dissolve the TRO so that he could proceed with the Trustee's Sale.³⁷ After conducting a hearing, Judge Allen Nielson dissolved the TRO on the morning of February 19, 2010 and directed the Trustee to proceed with the Trustee's Sale in accordance with the Notice of Trustee's Sale.³⁸ Schroeder neither posted a bond nor attempted to appeal Judge Nielson's Order.

D. The Court Grants Excelsior's Motion for Summary Judgment.

After the February 19, 2010 foreclosure sale was complete,

³² CP 245; CP 87.

³³ CP 8-17.

³⁴ CP 146-47; CP 244-46.

³⁵ CP 43-44.

³⁶ CP 245.

³⁷ CP 236-40.

³⁸ CP 45-51.

Excelsior moved for summary judgment to dismiss Schroeder's lawsuit under RCW 61.24.130's waiver rule.³⁹ Schroeder requested a continuance, but did not submit an affidavit to support the motion.⁴⁰ Judge Nielson ruled that because Schroeder had failed to properly use the pre-sale remedies under RCW 61.24.130 to stop the sale, all of Schroeder's claims were waived.⁴¹ Judge Neilson also awarded Excelsior its attorneys' fees under the Deed of Trust.⁴² Schroeder then filed this appeal.⁴³

IV. ARGUMENTS

RCW 61.24.130 provides the only means for challenging a commercial non-judicial foreclosure. Once a foreclosure sale has occurred, the grantor is barred from pursuing any post-sale remedies.⁴⁴

The only chance Schroeder has to prevail in this appeal is for this court to ignore the Supreme Court's holding in *Plein* and expand upon its 1999 decision in *Bowcutt v. Delta North Star Corporation*.⁴⁵

³⁹ CP 221-22.

⁴⁰ CP 54-56.

⁴¹ CP 117-123.

⁴² CP 140-41.

⁴³ CP 132-37.

⁴⁴ *Plein v. Lackey*, 149 Wn.2d 214, 225-226, 67 P.3d 1061 (2003); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007).

⁴⁵ 95 Wn. App. 311, 976 P.2d 643 (1999).

A. Judge Nielson Did Not Abuse His Discretion When He Dissolved The Wrongfully Issued TRO.

1. Standard of Review is Abuse of Discretion.

The granting or withholding of an **injunction** rests in the **sound discretion** of the **trial court**.⁴⁶ A trial court only abuses its discretion when that decision is based on untenable grounds, is manifestly unreasonable, or is arbitrary.⁴⁷ Moreover, an order that is “based on a hearing in which there was not adequate notice or opportunity to be heard is void.”⁴⁸

The issue then is whether Judge Nielson abused his discretion when he dissolved the February 15, 2010 TRO.

2. Washington’s Deeds of Trust Act.

Although significantly changed in 1998, 2008, and again in 2009, Washington’s Deeds of Trust Act (“Act”) was first enacted in 1965 to provide an alternative to the outmoded foreclosure process. As our Supreme Court noted, the Act should be construed to further three basic objectives.⁴⁹ First, the nonjudicial foreclosure process should remain

⁴⁶ *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981); *Blanchard v. Golden Age Brewing Co.*, 188 Wn. 396, 415-16, 63 P.2d 397 (1936).

⁴⁷ *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 74-75, 587 P.2d 1087 (1978).

⁴⁸ See *Esmieu v. Schrag*, 88 Wn.2d 490, 563 P.2d 203 (1977); citing *Sheldon v. Sheldon*, 47 Wn.2d 699, 289 P.2d 335 (1955).

⁴⁹ *Plein v. Lackey*, 149 Wn.2d 214, 225, 647 P.3d 1061 (2003) and *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

efficient and inexpensive.⁵⁰ Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.⁵¹ And third, the process should promote the stability of land titles.⁵²

3. The Deeds of Trust Act provides the exclusive means for conducting a non-judicial foreclosure.

The Act describes the steps that must be followed to properly foreclose a commercial debt secured by a deed of trust. The notices of foreclosure and Trustee's Sale must strictly comply with RCW 61.24.040.⁵³ If these steps are satisfied then the foreclosure extinguishes the debt and transfers title to the property for the benefit of the lender.⁵⁴

4. RCW 61.24.130 provides the only means to challenge a non-judicial foreclosure.

Our Supreme Court established in *Plein* that RCW 61.24.130 provides the “only means” for someone to contest and enjoin a foreclosure

⁵⁰ *Plein*, 149 Wn.2d at 225.

⁵¹ *Id.*

⁵² *Id.*

⁵³ And “since the statutes allowing for nonjudicial foreclosure dispense with many protections commonly enjoyed by borrowers, ‘lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower’s favor.’” *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005).

⁵⁴ RCW 61.24.130. *In re Marriage of Kaseburg*, 126 Wn. App. 546, 558, 108 P.3d 1278 (2005).

sale.⁵⁵ If a person fails to properly and successfully employ the presale remedies under RCW 61.24.130, they waive the right to contest the Trustee's Sale, or even the underlying debt.⁵⁶

As the *Plein* Court further noted, RCW 61.24.040(2) also requires that the recipients be provided notice as part of the Notice of Trustee's Sale and Notice of Foreclosure that advises the borrower of their right to contest the default and provide the trustee with a minimum of five (5) days notice of the hearing.

The Trustee complied with these notice requirements and put Schroeder on notice of what was required of him to halt the foreclosure proceedings. Schroeder chose not to exercise any of the available remedies.

5. Schroeder failed to comply with the Act's notice or bonding requirements.

RCW 61.24.130 clearly describes the four things that must be done to stop a Trustee's Sale.

First, the Trustee must be given at least five (5) days notice of the time when, place where, and the judge before whom the application for the

⁵⁵ *Plein*, 149 Wn.2d at 226 (“This statutory procedure is ‘the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.’”) (internal citations omitted).

⁵⁶ In *Plein*, the court held that “by failing to obtain a preliminary injunction or other restraining order restraining the Trustee's Sale, as contemplated by RCW 61.24.130” the plaintiff “waives any objections to the foreclosure proceedings.” 149 Wn.2d at 229.

restraining order or injunction is to be made. Second, the court may “only consider” the motion upon proof that the trustee has been personally served. Third, the complaining party must establish “any proper legal or equitable ground” to justify restraining the sale. And fourth, the court must “condition” the granting of the restraining order upon the “applicant” paying the clerk those sums described in RCW 61.24.130(1)(a-b).

Schroeder failed to satisfy at least three of these four requirements. He gave the Trustee less than a half-day’s notice of his intent to obtain a TRO. And this was by e-mail – he made no effort to serve the Trustee as required by law. Also, instead of posting the sums required under RCW 61.24.130(1)(a-b), Schroeder only offered to post a \$5,000 bond. And then, as it turns out, he did not even post this amount.

Because Schroeder completely failed to satisfy RCW 61.24.130, Judge Nielson dissolved the TRO and ordered the Trustee to proceed with the foreclosure sale. In requiring that the law be followed, Judge Nielson did not abuse his discretion.

6. CR 65(c) is a procedural rule and does not provide a substantive basis for the court to enjoin a sale.

Schroeder admits he did not comply with the Act. Accordingly, his only hope for relief is to argue that because his Motion for a TRO was filed under CR 65(c), and not under RCW 61.24.130, he did not need to

satisfy the notice or bonding requirements. This argument finds no basis in the law and has been soundly rejected by this Court and the Washington State Supreme Court.

RCW 61.24.130 is the “only way” for a court to stop a Trustee’s Sale once the notices of foreclosure have been served.⁵⁷ And while CR 65(c) provides general rules that govern the process for obtaining emergency and pre-trial injunctions, it *does not* trump the more specific statute that governs how a party can restrain a Trustee’s Sale. To allow otherwise would be to render RCW 61.24.130 superfluous.⁵⁸

While a court may issue a TRO without notice under emergency circumstances, it *cannot* restrain a Trustee’s Sale without the trustee being provided at least five (5) days notice of the hearing. This is especially true where, as here, the applicant cannot demonstrate why RCW 61.24.130 did not provide him an adequate remedy at law to pursue his presale remedies.⁵⁹ Indeed, Schroeder cannot explain why he waited more than 100 days before he took any legal action to stop the sale. Judge Nielson did not abuse his discretion when he refused to stop the Trustee’s Sale.

⁵⁷ *Plein*, 149 Wn.2d at 226.

⁵⁸ *See Plein*, 149 Wn.2d at 227.

⁵⁹ A court will only intervene and grant injunctive relief, if there is no other adequate remedy at law. *Orwick v. Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984).

In this case, the Legislature has provided a fair, meaningful, and clear process for those who wish to stop a Trustee’s Sale. Schroeder therefore had an adequate remedy at law to stop the Trustee’s Sale.

B. Schroeder's Failure To Restrain The Trustee's Sale Means He Is Legally Barred From Challenging The Foreclosure.

Schroeder did not succeed in stopping the Trustee's Sale. The next question is whether this failure means that Schroeder was barred from challenging the Deed of Trust or the underlying obligations. The answer is yes under the well-established waiver doctrine.

1. Standard of Review is De Novo.

When reviewing an order of summary judgment, this Court engages in the same inquiry as the trial court.⁶⁰ Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁶¹

The key facts are not in dispute. The only legal issue is whether Schroeder waived his right to contest the Deed of Trust when he failed to properly use the Act's presale remedies to stop the Trustee's Sale.

2. Washington's Waiver Rule.

The law in Washington is that once a deed of trust on commercial property is non-judicially foreclosed, the grantor is cut off from pursuing **any** remedies. "A party waives the right to contest the underlying obligations on property in a foreclosure proceeding when there is no

⁶⁰ *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007) *citing* RAP 9.12; *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

⁶¹ CR 56(c).

attempt to use the presale remedies in RCW 61.24.130.”⁶² Specifically, a party waives any right to pursue any post sale relief when that party (1) receives notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.⁶³

In *Plein*, the plaintiff filed a Complaint for injunction long before the Trustee’s Sale. Although the trustee postponed the sale a few times, the property was eventually foreclosed. The Court held that merely filing for an injunction was not sufficient under RCW 61.24.130—the borrower needed to actually stop the foreclosure sale.

Our Supreme Court in *Plein* unanimously held that “the waiver rule...appropriately effectuates the statutory directives that any objection to the Trustee’s Sale is waived where remedies are not pursued.”⁶⁴ By “failing to obtain a preliminary injunction or other restraining order restraining the Trustee’s Sale, as contemplated by RCW 61.24.130, Plein waived any objection to the foreclosure proceedings.”⁶⁵

Also key is that *Plein* was decided in 2003. The legislature has amended the Act twice since then—once in 2008 and again in 2009.

⁶² *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007); *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008).

⁶³ *Brown*, 146 Wn. App. at 163.

⁶⁴ *Plein*, 149 Wn.2d at 229.

Not only has the legislature not sought to clarify the court's ruling in *Plein*, it has expressly endorsed the waiver rule.

For example, in 2009, the legislature adopted a new section to the Act, RCW 61.24.127. This law (Senate Bill 5810, Section 6) created an exception to the waiver rule for "owner-occupied residential property."⁶⁶ But the legislature did not change the law with respect to commercial loans, like the one at issue in this case. Since this involves non-owner occupied residential property, the waiver rule applies.⁶⁷

The only issues of fact for purposes of deciding whether the waiver rule applied are whether Schroeder (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to enjoin the sale.

C. Schroeder Received the Proper Notices Under RCW 61.24.040 and was at Least Constructively Aware Of What He Needed To Do To Restrain The Sale, And The Consequences If He Failed To Exercise Those Rights.

⁶⁵ *Plein*, 149 Wn.2d at 227.

⁶⁶ RCW 61.24.127(5)[4] expressly provides that it does not apply to the foreclosure of a deed of trust used to secure a commercial loan.

⁶⁷ As Division One recently noted in *Brown*: "Finally, we note that the legislature recently conducted an extensive review of the Act. Although it amended the Act considerably, the legislature did not modify the application of the waiver doctrine. We interpret the legislature's inaction as acquiescence in the courts' interpretation of the waiver doctrine. The legislature's clarification that a Trustee's Sale may be restrained for 'any proper *legal or equitable* ground' without any further amendment of RCW 61.24.130 thus confirms that parties must either pursue presale remedies or waive their right to bring any claims relating to obligations secured by the foreclosed deed of trust." 146 Wn. App. at 170-171.

Schroeder admits he received the November 6, 2009 Notices and that these Notices instructed him on what he needed to do to stop the foreclosure, and the consequences if he did not succeed in restraining the sale by court action.⁶⁸ Schroeder received the Notice of Trustee's Sale and the Notice of Foreclosure more than 100 days before the scheduled February 19, 2010 Trustee's Sale. Yet he failed to bring a timely motion to restrain the sale or offer why he could not have acted sooner.

D. Schroeder Was Aware Of Those Facts To Support his Claim Long before February 15, 2010.

Schroeder had actual or constructive knowledge of those facts that he now claims as the basis for challenging the Deed of Trust. Schroder's only excuse for not bringing the action earlier was that he did not have an attorney. During the hearing on Excelsior's Motion to Dissolve the TRO, the Judge questioned Schroeder's attorney regarding the delay in bringing an action to halt the sale:

Judge Nielson: But then I would ask, well, then, Mr. Schroeder, he has been aware of this pending sale, presumably, for weeks if not months. I'm wondering about his part in coming to you at such a later date to have you try to stop the sale. I think that's something that I can look at, here, can't I?

Schroeder's attorney Matthew Pfefer: I think you can, but my understanding is that Mr. Schroeder had been looking for somebody who could (inaudible) show him the way to address the issues he has here for quite some time

⁶⁸ RCW 61.24.040(2).

and didn't find me until February 5.

Schroeder initially attempted to stop the foreclosure on February 8, 2010 by claiming that the property was agriculture, and therefore had to be judicially foreclosed. But when the Trustee brought to Schroeder's attorney's attention that Schroeder had already tried this and had waived this defense in a previous court action, Schroeder withdrew his Motion and struck the February 16 hearing date. However, eight (8) days later, on February 16, 2010, in what can only be described as a Hail Mary attempt to stop the sale, Schroeder's attorney filed an Amended Complaint and a different Motion for a TRO. This time, he claimed for the first time that Excelsior had used "predatory" lending practices in violation of the Consumer Protection Act when it issued and administered the loan.

This is precisely what the debtor tried but failed to do in the *Brown* case. In that case, the Browns alleged that Household failed to disclose the terms and conditions of their loan contracts, induced them to enter loan contracts with excessive fees and excessive interest rates, required them to purchase unwanted credit insurance for the loans, and misled them into believing that they were purchasing unemployment and disability insurance coverage for their first position loan rather than for their second position loan.⁶⁹ Two years after the foreclosure, the Browns sued for

⁶⁹ *Brown*, 146 Wn. App. at 160-61.

fraud; breach of the covenant of good faith and fair dealing; violation of the Washington Consumer Protection Act;⁷⁰ violation of the federal Truth in Lending Act;⁷¹ and breach of fiduciary duty and quasi-fiduciary duty.⁷²

But because the Browns failed to stop the foreclosure sale, the trial court granted summary judgment to Household and dismissed the lawsuit.⁷³ The Court of Appeals affirmed, holding that the waiver rule meant Brown's post-sale claims were barred.

On appeal, the Browns argued against waiver because they claim that they did not have an attorney and therefore were ignorant of their rights.⁷⁴ The court of appeals rejected this argument by stating: "In applying the waiver doctrine, a person is not required to have knowledge of the legal basis for his claim, but merely knowledge of the facts sufficient to establish the elements of a claim that could serve as a defense to foreclosure...."⁷⁵

The Court in *Brown* also noted that in *Universal Life Church v. GMAC Mortgage Corporation* the United States District Court for the

⁷⁰ Chapter 19.86 RCW.

⁷¹ 15 U.S.C. §§ 1601-1667f.

⁷² *Brown*, 146 Wn. App. at 160-62.

⁷³ *Id.* at 160.

⁷⁴ *Id.* at

⁷⁵ *Brown*, 146 Wn. App. at 151.

Western District of Washington held that the plaintiffs had waived their claims because the three requirements of waiver—notice of the sale, knowledge of the claims, and failure to restrain the sale—were met.

Schroeder was aware of those facts to support his consumer protection act claims long before February 16, 2010 and therefore had no excuse for not taking earlier action to stop the Trustee's Sale.

E. Schroeder Failed To Timely Obtain A Court Order To Prevent The Trustee's Sale.

Schroeder failed to persuade the court to stop the Trustee's Sale because he did not use the proper procedures under RCW 61.24.130. He also did not try to appeal the court's order.

Without citing to any authority, Schroeder argues that the mere filing of the lawsuit and his attempt to restrain the sale by seeking an injunction under CR 65(c) is sufficient to avoid the waiver rule. Schroeder wants this court to create an exception to the statute – the “we tried, but failed exception to the waiver rule for those who, without excuse, fail to comply with the pre-sale remedies under RCW 61.24.130. He wants this court to rule that a party can proceed with their post-sale claims even if they did not properly stop the sale. This Court should reject adopting this new law for the following reasons.

First, this type of exception would totally undermine the purposes of the Act. As the Supreme Court stated in *Cox v. Helenius*, the Act

should be construed to further three basic objectives explained previously.⁷⁶ The “waiver doctrine...serves all three goals of the deed of trust act. Adequate remedies to prevent wrongful foreclosure exist in the presale remedies, and finding waiver... furthers the goals of providing an efficient and inexpensive foreclosure process and promoting the stability of land titles.”⁷⁷

Second, the “we tried, but failed” exception to the waiver rule would essentially overturn *Plein* and defeat the policy reasons for allowing challenges to linger after a Trustee’s Sale has been finalized. Permitting the “we tried, but failed” approach was flatly rejected by *Plein* because it “would be unnecessary to obtain an actual order restraining the sale or to provide five days’ notice to the trustee and payment of amounts due on the obligation.”⁷⁸

Third, creating an exception for Schroeder under these circumstances would open up a Pandora’s box to others who simply failed, without excuse, to properly utilize the clear, fair, and straightforward pre-sale remedies provided by RCW 61.24.130. This would create a cloud of

⁷⁶ 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

⁷⁷ *Plein* at 227-28, n. 5 “That if a trustee’s deed can be challenged after the fact, ‘title insurers will not insure, secured lenders will not lend on, and buyers will not purchase real property with title tracing to a trustee’s deed.’”

⁷⁸ Citing *Svensden v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001).

uncertainty in the foreclosure process, which is exactly what the legislature has intended to avoid.

It would also reward negligent behavior—especially where Schroeder did not even try to use the remedies contained in RCW 61.24.130.

In summary, the Act provides a clear, fair, and efficient procedure for those who wish to challenge a foreclosure sale before the sale occurs. The waiver rule has likewise been clearly established by the courts and, except for owner-occupied residential properties, endorsed by the legislature as recently as 2009. An exception, especially one under these circumstances, is not warranted and should be rejected.

1. ***Bowcutt Does Not Apply.***

Schroeder argues that this Court’s 1999 decision in *Bowcutt v. Delta North Star Corporation* controls and stands for the proposition that RCW 61.24.130 is not the only way to stop a foreclosure sale.⁷⁹ In light of court decisions that have been issued since *Bowcutt* and the 1998, 2008, and 2009 legislative amendments that (1) incorporated the Consumer Protection Act as a cause of action under the Deeds of Trust Act;⁸⁰ (2) clarified that all “legal and equitable claims may be brought to restrain

⁷⁹ 95 Wn. App. 311, 976 P.2d 643 (1999).

⁸⁰ RCW 61.24.135 (SB 6191 1998).

a foreclosure sale under RCW 61.24.130⁸¹; and (3) created an exception to the waiver rule, but only for foreclosures involving owner-occupied residential real property.⁸² Regardless, *Bowcutt* should not govern the outcome in this case.

The plaintiffs in *Bowcutt* were homeowners. The defendant, Mark Pitts, was a convicted felon who duped homeowners into unfair loans.⁸³ When the homeowners defaulted on their loans, the defendants proceeded with a foreclosure, including having the trustee arrange for a Trustee's Sale for May 16, 1997.⁸⁴

On May 8th, eight days prior to the Trustee's Sale, the plaintiffs filed a lawsuit under Washington's Criminal Profiteering Act and served the Trustee with a Motion to Restrain the Sale.⁸⁵ A hearing was set for May 15, which provided the Trustee with the requisite five days notice.⁸⁶

At the hearing, a Court Commissioner granted the TRO under the Criminal Profiteering Act and set a \$50,000 bond.⁸⁷ On June 5, 1997, the trial court held a hearing on the preliminary injunction and extended the TRO, but modified the injunction to require the plaintiffs to "deposit the

⁸¹ RCW 61.24.130 (SB 5378, Section 5, 2008).

⁸² RCW 61.24.127 (SB 5810 2009).

⁸³ 95 Wn. App. at 314-16.

⁸⁴ *Id.*

⁸⁵ RCW 9A.82.

⁸⁶ 95 Wn. App. at 316.

full amount in default including periodic interest payments” as he felt was required under RCW 61.24.130. But because the plaintiffs could not pay the “entire amount in default as required by the Deeds of Trust Act,” the trial court dissolved the injunction.⁸⁸ The plaintiffs then, unlike Schroeder in this case, sought and obtained discretionary review by the Court of Appeals.

The court started its analysis by determining that the Criminal Profiteering Act (“little Rico”) provides private parties an independent basis to obtain injunctive relief.⁸⁹ The court then analyzed whether the bonding requirements of RCW 61.24.130 applied to injunctions issued under the Criminal Profiteering Act.⁹⁰

The Court of Appeals, after acknowledging that this was a case of first impression and that the Deed of Trusts Act conflicted with the Criminal Profiteering Act, decided the trial court should have excused the plaintiffs from depositing the “default” amount for the following reasons.⁹¹

First, the plaintiffs were unable to afford the “default” amount and

⁸⁷ *Id.*

⁸⁸ *Id.*, at 320.

⁸⁹ *Id.* at 316-18.

⁹⁰ *Id.* at 319.

⁹¹ *Id.* at 320.

therefore could not stop the sale.⁹² Second, the trial court should have granted the injunction under RCW 9A.82 and not RCW 61.24.130.⁹³ And finally, the Court held that “remedies involving fraud are within the exclusive equitable jurisdiction of the court.”⁹⁴

For the following reasons, the *Bowcutt* case does not apply, or at least should not be followed. First, unlike the Criminal Profiteering Act, Washington’s Consumer Protection Act does not provide an independent basis for a private party to obtain an injunction.

The second reason *Bowcutt* does not govern is that, in 2008 and again in 2009, the legislature passed amendments to the Act to make clear that it intended for RCW 61.24.130 to provide the exclusive means for challenging a foreclosure sale. By adding a section to the Act (RCW 61.24.135) that expressly incorporates the Consumer Protection Act and inserting the words “legal or equitable” between “proper” and “ground” in RCW 61.24.130(1), the legislature clearly intended for all claims to be raised through a pre-sale challenge—all challenges to a Trustee’s Sale must be initiated by restraining the sale under RCW 61.24.130.

Third, *Bowcutt* was decided several years before *Plein* where our Supreme Court unequivocally held that RCW 61.24.130 “is the only

⁹² *Id.*

⁹³ *Id.* at 321.

means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.”⁹⁵

Fourth, and unlike the plaintiffs in *Bowcutt*, there is no evidence why Schroeder was not able to comply with RCW 61.24.130. Unlike the plaintiffs in *Bowcutt*—who were unable to raise the required sums of money to stop the sale and therefore would have been unable to proceed with their RICO claims, Schroeder has failed to offer any reason why he could not have brought his Motion to Restrain the Sale on time, or why he could not have served the Trustee with at least 5-days notice or post the required “default” amount with the court.

Fifth, unlike the Plaintiffs in *Bowcutt* case who filed for discretionary review before the Trustee’s Sale was closed, Schroeder failed to appeal Judge Neilson’s order dissolving the injunction. And so, under the law, the property was sold which rendered the case moot.

And finally, unlike the residential borrowers in *Bowcutt*, *our* case involves a commercial loan that does not implicate an owner-occupied residential property. As stated above, in 2009, the legislature created an exception to the waiver rule for lenders who live in their home. Had the legislature wanted to create a similar exception for commercial loans, it

⁹⁴ *Id.* at 320.

⁹⁵ *Plein* 149 Wn.2d at 226; *quoting Cox*, 103 Wn.2d at 388.

would have so provided.

For these reasons, this Court should decline to find that *Bowcutt* governs the outcome in this case, even if it determines that *Bowcutt* is still valid precedent.

F. Judge Nielson did not abuse his discretion when he denied Plaintiff's Motion to Continue the Summary Judgment Hearing.

CR 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A trial court's refusal to continue a summary judgment can only be overturned if the judge abused his discretion.⁹⁶ Moreover, CR 56(f) requires that the moving party "present by affidavit facts essential to justify his opposition." In other words, the requesting party must at least submit an affidavit to demonstrate what additional evidence may be discovered to justify a continuance.⁹⁷

In this case, Schroeder simply did not submit an affidavit in support of his Motion. This means he did not comply with the rule.

⁹⁶ *Mossman v. Rowley*, 154 Wn. App. 735, 229 P.3d 812 (2009) (denial is appropriate when the requesting party has not, by affidavit, offer a good reason for the delay).

⁹⁷ *Durrand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d 189, 195 (2009).

Therefore, Judge Nielson did not abuse his discretion when he refused to grant a continuance.

But even if Schroeder had submitted the required affidavit, he would not have been able to show that further discovery would have created a material issue of fact. The undisputed facts are that Schroeder (1) properly received notice of his right to enjoin the sale; (2) had actual or constructive knowledge of those facts that could be raised to stop the sale; and (3) failed to successfully stop the foreclosure sale.⁹⁸ No amount of time, or additional discovery, would have changed these undeniable facts. Therefore, Judge Nielson did not abuse his discretion when he denied Schroeder's request to continue the summary judgment hearing.

G. Because It Was Required To Defend Its Rights Under The Deed Of Trust, Excelsior Is Entitled To Its Fees And Costs.

Schroeder argues Judge Nielson should not have awarded fees to Excelsior because: (1) Schroeder's lawsuit did not involve the enforcement or interpretation of the Deed of Trust; and (2) any attorneys fees that were due were released, together with the underlying debt, at the Trustee's Sale. His arguments fail because Excelsior was required to defend the Deed of Trust and Excelsior had a right to be reimbursed its legal fees under the choice of remedies section of the contract.

⁹⁸ See *Plein*, 149 Wn.2d at 227.

Under RCW 4.84.330, a court must award the prevailing party their attorney's fees where the parties have an agreement with an attorney's fee provision. The Promissory Note and Deed of Trust contain attorney fees provisions.⁹⁹

And Section 17.5 of the Deed of Trust contains an Election of Remedies provision that provides that "Election by Beneficiary to pursue any remedy shall not exclude pursuit of any other remedy, and all remedies...are distinct and cumulative and not exclusive to all other rights or remedies...."¹⁰⁰

The exact arguments that Schroeder is making in this case were made and rejected by this court in *CHD*.¹⁰¹ In that case, the Trustee's Sale was set for September 24, 2004.¹⁰² On September 23, 2004, the borrower, CHD, filed a declaratory action claiming the underlying debt was barred by the statute of limitations.¹⁰³ Although the Trustee's Sale was continued

⁹⁹ Section 23 of the Deed of Trust provides, in pertinent part, as follows: "**ATTORNEY FEES:** In the event suit or action is instituted to enforce or interpret any of the terms of this Trust Deed,...the prevailing party shall be entitled to recover all expenses reasonably incurred at, before and after trial and on appeal whether or not taxable as costs.... Whether or not any court action is involved, all reasonable expenses,... incurred by Beneficiary that are necessary or advisable at any time in Beneficiary's opinion for the protection of its interest and enforcements of its rights shall become a part of the Indebtedness **payable on demand**...."

¹⁰⁰ CP 327.

¹⁰¹ *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007), rev. den. 162 Wn.2d 1022 (2008).

¹⁰² 138 Wn. App. at 134-36.

¹⁰³ *Id.* at 135.

several times, a successor trustee eventually sold the property to the lender at a January 21, 2005 Trustee's Sale.¹⁰⁴

CHD then brought a summary judgment motion on its claim that the Trustee's Sale was barred by the statute of limitations.¹⁰⁵ Applying the waiver rule, the court held that the claim was barred because CHD had "failed to contest the trustee sale as required by RCW 61.24.130."¹⁰⁶ The court also awarded attorney's fees.¹⁰⁷

On appeal, CHD argued that the lender was not entitled to her fees because, by pursuing the non-judicial foreclosure, she had waived her right to also collect her fees.¹⁰⁸ The Court of Appeals rejected this argument: "The election of remedies rule has a narrow scope, its sole purpose being the prevention of double redress for a single wrong. The rule does not apply here. Ms. Boyles chose a nonjudicial foreclosure, but she was compelled to defend the nonjudicial foreclosure in a declaratory action because CHD did not comply with the statute to contest the sale."¹⁰⁹

This Court then addressed whether the lender was entitled to recover their legal fees when required to defend against a borrower's

¹⁰⁴ *Id.* at 136.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 137.

¹⁰⁷ *Id.* at 136.

¹⁰⁸ *Id.* at 138.

¹⁰⁹ *Id.* at 140.

challenge to the deed of trust:

The language of RCW 4.84.330 is mandatory; it does not allow for an exercise of discretion in deciding whether to award fees. The only discretion is as to the amount. The contract containing the attorney fees provision must be central to the controversy. The court did not err in awarding attorney fees to Ms. Boyles (internal citations omitted).¹¹⁰

Because Schroeder filed a lawsuit to challenge the Deed of Trust, Excelsior is entitled to its fees, including any fees it has incurred on this appeal.

H. Since Schroeder Did Not Prevail On His CPA Claims, He Is Not Entitled To His Fees.

Schroeder claims he was entitled to his fees under Washington's Consumer Protection Act. While it is true that RCW 19.86.090 may permit a plaintiff to recover their fees, they must first be deemed the prevailing party. Because Schroeder failed to preserve his CPA claims, he cannot be deemed the prevailing party.

I. Excelsior Is Entitled To Its Attorney Fees And Costs On Appeal.

As argued above, Excelsior prevailed before the trial court and therefore was entitled under the parties' attorney's fees provision to recover its legal fees. For the same reason, and under RAP 18.1, Excelsior is entitled to its fees on appeal.

¹¹⁰ *Id.* at 320-21.

V. CONCLUSION

Judge Nielson did not abuse his discretion when he, after discovering Schroeder's failure to comply with RCW 61.23.130, dissolved the TRO and ordered the Trustee to proceed with the sale. And, under the wavier rule, Judge Nielson properly dismissed the lawsuit and granted Excelsior its attorney's fees.

For these reasons, Excelsior asks that this court affirm the trial court's decision.

Dated this 3rd day of March, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

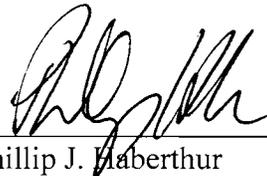
By: 
Bradley W. Andersen, WSBA # 20640
Phillip J. Haberthur, WSBA #38038
Craig G. Russillo, WSBA #27998
Attorneys for Respondents,
Phillip J. Haberthur, Excelsior
Management Group, LLC; and
Excelsior Mortgage Equity Fund, II,
LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2011,
I caused to be served the foregoing RESPONDENTS' BRIEF on the
following party at the following address:

Matthew F. Pfefer
Caruso Law Offices
10417 E 4th Ave Apt 10
Spokane Valley, WA 99206-3638

by delivering to him a true and correct copy thereof, certified by me as
such, by way of electronic mail (agreed upon by parties).



Phillip J. Haberthur

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STEVEN F. SCHROEDER,
Appellant,

v.

PHILLIP J. HABERTHUR, as Trustee,
EXCELSIOR MANAGEMENT GROUP, LLC;
EXCELSIOR MORTGAGE EQUITY FUND II, LLC;
JAMES HANEY; and C.L.S. MORTGAGE, INC.,
Respondents.

RESPONDENT C.L.S. MORTGAGE, INC.'S BRIEF

Michael H. Church, WSBA No. 24957
Darren M. Digiacinto, WSBA No. 39771
Attorneys for Respondent C.L.S. Mortgage, Inc.
Stamper Rubens, P.S.
720 West Boone Avenue, #200
Spokane, WA 99201
Telephone: (509) 326-4800

ORIGINAL

I. JOINDER PURSUANT TO RAP 10.1(g)

Respondent C.L.S. Mortgage, Inc., by and through its attorneys of record, respectfully submits this joinder brief in response to Appellant Steven Schroeder's appeal. Pursuant to RAP 10.1(g), C.L.S. Mortgage, Inc., adopts by reference the following portions of Respondents Phillip J. Haberthur, Excelsior Management Group, LLC, and Excelsior Mortgage Equity Fund, II, LLC's Brief:

Table of Authorities

- I. Introduction.
- II. Statement of Issues – Subparts 1 through 4.
- III. Counterstatement of the Case – In its entirety.
- IV. Arguments – Subsections G and I Intentionally Omitted.
 - A. Judge Nielson Did Not Abuse His Discretion When He Dissolved The Wrongfully Issued TRO.
 - B. Schroeder's Failure To Restrain The Trustee's Sale Means He Is Legally Barred From Challenging The Foreclosure.
 - C. Schroeder Received the Proper Notices Under RCW 61.24.040 and was at Least Constructively Aware Of What He Needed To Do To Restrain The Sale, And The Consequences If He Failed To Exercise Those Rights.
 - D. Schroeder Was Aware Of Those Facts To Support his Claim Long before February 15, 2010.

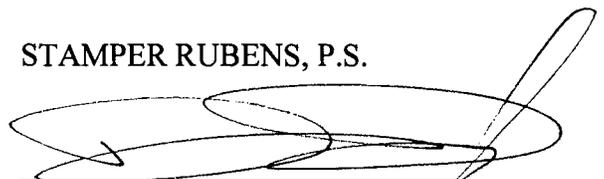
- E. Schroeder Failed To Timely Obtain A Court Order To Prevent The Trustee's Sale.
- F. Judge Nielson did not abuse his discretion when he denied Plaintiff's Motion to Continue the Summary Judgment Hearing.
- H. Since Schroeder Did Not Prevail On His CPA Claims, He Is Not Entitled To His Fees.

V. Conclusion.

For the reasons provided by adoption, C.L.S. Mortgage, Inc. asks that this Court affirm the trial court's decision.

DATED this 21st day of March 2011.

STAMPER RUBENS, P.S.



Michael H. Church, WSBA No. 24957
Darren M. Digiacinto, WSBA No. 39771
Attorneys for Respondent C.L.S. Mortgage, Inc.
Stamper Rubens, P.S.
720 West Boone Avenue, #200
Spokane, WA 99201
Telephone: (509) 326-4800

CERTIFICATE OF SERVICE

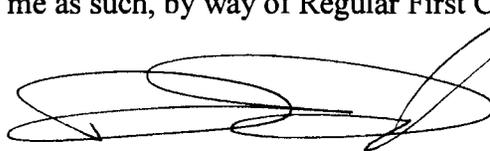
I hereby certify that on the 21st day of March 2011, I caused to be served the within and foregoing **RESPONDENT C.L.S. MORTGAGE, INC.'S BRIEF** on the following parties at the following addresses:

Matthew F. Pfefer, Esq.
1426 West Francis Avenue
Spokane, WA 99205

Phillip J. Haberthur, Esq.
Schwabe Williamson & Wyatt
700 Washington Street, Suite 701
Vancouver, WA 98660-3338

Dianne K. Rudman, Esq.
Rudman Law Office
819 West 7th Avenue
Spokane, WA 99204-2808

by delivering to said parties a true and correct copy of the same, certified by me as such, by way of Regular First Class U.S. Mail, postage prepaid.



MICHAEL H. CHURCH
DARREN M. DIGIACINTO